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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 50

THE UNITED STATES, PETITIONER

vs.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 1, 1946
CERTIORARI GRANTED APRIL 22, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 902

THE UNITED STATES, PETITIONER

vs.

THE HOWARD P. FOLEY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 45739

THE HOWARD P. FOLEY COMPANY, INC., A CORPORATION

v.

THE UNITED STATES

Petition

Filed August 19, 1942

To the Honorable, The Court of Claims:

1. The plaintiff, The Howard P. Foley Company, Inc., is a corporation duly organized and existing under the laws of the District of Columbia, and was at the time herein mentioned engaged in the business of electrical contracting and in the installing and furnishing of electrical wiring and lighting systems.

2. On June 27, 1940, the United States, acting through the Civil Aeronautics Authority, entered into a contract with the
2 plaintiff for the furnishing of the materials and performance of the work for field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with the specifications, schedules and drawings, which were by reference made a part of the said contract, all for the sum of $187,000. A copy of the pertinent parts of said contract is filed herewith as Exhibit "A" and by reference made a part hereof.

3. The contract provided in Article 9 thereof that should the contractor fail to prosecute the work or any part thereof within the time specified in the said contract, the United States might by written notice terminate its right to proceed with the work. It further provided that the right of the contractor to proceed should no be terminated nor should he be charged with liquidated damages because of delays in the completion of the work due to unforeseeable causes beyond its control and without its negligence, including acts of the Government, and that in the event of a delay from such cause the contractor should notify the contracting officer in writing of the causes of delay and that the latter should ascertain the facts and extent of the delay and extend the time for completing the work when in his judgment the findings of fact justified such an extension, and his findings of fact should be final and conclusive on the parties, subject only to an appeal therefrom within 30 days. Article 15 of the contract provided that, except as otherwise provided in the contract, all disputes concerning questions of fact arising under the contract should be decided by the

contracting officer, subject to written appeal by the contractor within 30 days to the head of the department or his representative, whose decision should be final and conclusive upon the parties thereto.

3 4. The plaintiff entered into and upon the performance of its contract on or about July 16, 1940, and proceeded to construct and completed the work required. The United States, however, failed to make available to the contractor the site upon which the work was to be done, either at the time the contract was made or at the time the plaintiff was required to commence its work thereunder. Portions of the site were made available to the plaintiff at various times and in irregular and disconnected sections. As a result thereof the plaintiff was delayed a total of 157 days in the completion of the work under its contract, and its performance was extended 157 days beyond the time necessary to its completion except for such delays.

5. The plaintiff gave written notice to the contracting officer of the fact of these delays and the contracting officer thereupon found that the plaintiff was delayed by the failure of the United States to furnish the site in sufficient time to enable it to complete the work within the time prescribed in the contract, and that the plaintiff was thereby prevented from starting and performing its work in an expeditious manner. The contracting officer further found that a total of 157 days of delay from this cause was occasioned the plaintiff in the performance of its work under the contract. No appeal was taken from the finding of the contracting officer by either the plaintiff or the United States.

6. As a result of the failure of the United States to furnish the site for the work, the plaintiff was required to proceed in an irregular and uneconomical manner in the performance of the work under the contract, and by reason of the extended period of
4 performance of 157 days, the plaintiff incurred and was obliged to pay additional overhead by way of maintaining superintendent and administrative forces, together with equipment and operators therefor, upon the site of the work for 157 days longer than would have been necessary had the work proceeded without such delay, and as a further incident of such delay additional Social Security and unemployment taxes and workmen's compensation insurance upon the superintendent, administrative and other forces likewise accrued, together with an additional general overhead to the plaintiff in the administration of its business.

7. The total amount of additional expense and damage incurred by the plaintiff on account of the delays occasioned by the United States is $14,761.38.

8. The plaintiff filed its claim with the Civil Aeronautics Authority for reimbursement of said expense and the said claim was disallowed by the said Authority.

9. No other action has been had on said claim in Congress or by any of the other departments. No person other than the plaintiff is the owner thereof nor interested therein. No assignment or transfer of this claim or any part thereof or interest therein has been made. The plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abbetted or given encouragement to rebellion against the said Government. The plaintiff claims $14,761.38.

HINTON & HERON,
By ALEXANDER M. HERON,
Attorneys for Plaintiff,
Munsey Building, Washington, D. C.

[*Duly sworn to by Howard P. Foley; jurat omitted in printing.*]

Exhibit "A" to petition

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 27th day of June, 1940, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and the Howard P. Foley Company, Inc. a corporation organized and existing under the laws of the District of Columbia a partnership consisting of
an individual trading as
of the city of Washington in the State of District of Columbia hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with the bid on Bid No. 1 of Proposal No. 519, for the consideration of $187,000.00 in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:

Proposal No. 519 and specifications and drawings mentioned therein and attached thereto.

The work shall be commenced as soon as practicable, and shall be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed.

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor for proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The

contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * *

ARTICLE 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay.

In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head

of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on
11 the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ARTICLE 11. *Eight-hour law—Convict labor.*—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

* * * * *

ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his
12 own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * * *

ARTICLE 17. *Rate of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1) this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor and subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid, as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

* * * * * *

ARTICLE 21. *Definitions.*—(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the terms "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

14 In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By C. M. Estep,
C. M. ESTEP,
Chief, Office Service Division.
THE HOWARD P. FOLEY COMPANY,
INC., *Contractor.*
H. P. FOLEY, *President,*
2020 Eye St. NW., Washington, D. C.

Attest:
[CORPORATE SEAL] MARTIN RISTIG, *Sec'y.*

15 *General traverse*

Filed September 28, 1942

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S.) FRANCIS M. SHEA,
Assistant Attorney General.

P. M.
E. E.

Argument and submission of case

On October 8, 1945, the case was argued and submitted on merits by Mr. Alexander M. Heron for plaintiff and by Mr. Robert Burstein for defendant.

Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J.

Filed December 3, 1945

Mr. Alexander M. Heron for the plaintiff. Hinton & Heron were on the briefs.

Mr. Robert Burstein, with whom was Mr. Acting Assistant Attorney General John F. Sonnett, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and report of a commissioner, makes the following

Special findings of fact

1. The plaintiff is a corporation organized and existing under the laws of the District of Columbia with an office and place of business in the city of Washington, D. C. It is engaged in the business of contracting for electrical work and in the installation and furnishing of electrical wiring and lighting systems.

2. On June 27, 1940, the plaintiff entered into a written contract with the defendant, represented by C. M. Estep, Chief, Office Service Division, Civil Aeronautics Authority, as contracting officer, whereby the plaintiff, for a consideration of $187,000, agreed to furnish the materials, and perform the work for field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with its bid and proposal and specifications and drawings mentioned therein and attached thereto, the work to be commenced as soon as practicable and be completed within 120 calendar days from the date of receipt of notice to proceed.

18 Notice to proceed was received by the plaintiff July 15, 1940, thus fixing the time for completion on or before November 12, 1940.

Article 1-11 of the specifications provided:

"*Interference with business.*—(A) The Government's Representative, under whose direction the work will be performed, shall be consulted as to the time and manner of starting the work so as to cause the least interference with other contractors. The contractor shall keep sufficient men and materials at the site to insure completion of the work within the specified time.

"(B) The work shall be carried on in such manner that there will be no interruption to or interference with the proper execution of Government business."

Article 3-16 of the specifications provided:

"*Knowledge of conditions.*—It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract."

Article 3-25 required cooperation of the contractor and coordination of his work with other work.

Article 5-2 provided:

"As the paving of the runways and taxiways is completed, the rough grading of the shoulders will be performed by the Government, and sections so rough graded will be released to this Contractor for work under this contract."

Article 9 of the contract gave the contracting officer authority to extend the time of performance, under findings of fact to be made by him, "when in his judgment the findings of fact justify such an extension."

Copy of the contract and specifications is filed in evidence and made part hereof by reference.

3. Immediately upon receipt of the notice to proceed the plaintiff proceeded with the work, prosecuted it to completion,
19 and has been paid the contract price as adjusted by change orders. Performance by the plaintiff was completed April 18, 1941, a delay in completion, based on the original contract time, of 157 days.

4. Soon after the inception of plaintiff's work it discovered that due to extended periods between releases by the defendant of areas that the plaintiff could work on, it would be unable to finish in contract time.

The plaintiff complained of this situation to the resident engineer of the Civil Aeronautics Authority and on September 3, 1940, explained the situation to the contracting officer, asking for an extension of time and adjustment for additional overhead and expense.

On September 23, 1940, the contracting officer replied, instructing the plaintiff to keep both the resident engineer and the contracting officer currently informed as to all matters of delay, and stating that upon completion of the work, consideration would be given to an appropriate extension of time.

The plaintiff complied with this procedure and both parties to the contract were fully informed as to delays.

December 20, 1940, the contracting officer made the following findings of fact and communicated them in writing to the plaintiff:

"Reference is made to your letter of December 4, 1940, and previous correspondence, as well as to your personal discussion of December 13, 1940, with our Mr. W. C. Thompson, relative to your request for an extension as of December 12, 1940, in time of performance of contract numbered CAA-2704, covering the field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with your bid on proposal invitation numbered 519. The facts in the case are summarized as follows:

"Contract time was 120 calendar days from date of receipt of notice to proceed. Order numbered 41-1600, dated July 8, 1940, constituted your notice to proceed, and was received by you on

July 15, 1940, thus fixing July 16, 1940, as the starting date of your contract time. Up to December 12, 1940, 150 calendar days had elapsed.

"The contract provided for a liquidated damage deduction of $100.00 per day for each day of delay in completion of the work, but further provided that the contractor shall not be charged liquidated damages because of any delay in completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to acts of the Government, acts of another contractor in performance of a contract with the Government, etc.

"It has been established that the Government has, by force account, graded certain areas of the airport and released such graded areas to the paving contractor. Upon completion of the paving such areas were released to you for starting work under your contract.

"Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner. It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that at no time have you been entirely stopped from your work and that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected. It is further represented that you maintained adequate administrative personnel to perform supervision of the W. P. A. forces which could have been utilized had no delays existed and had the areas been released to you when you were ready for them. It further appears that all equipment and materials to be furnished by you were ready or could have been ready for use in time to have allowed you to perform the work immediately upon release of the areas to you and that no delay would have been chargeable to you in this respect. In the circumstances you are entitled to an extension of contract time commensurate with the actual delay caused you by such conditions.

"Under the provisions of the contract you were to be furnished not to exceed 180,000 W. P. A. man-hours for the entire project. By dividing this number of man-hours by the contract time of 120 calendar days gives an average of 1,500 man-hours which the-

oretically could have been used by you each day during the contract time. On this basis, the number of man-hours of
21 W. P. A. labor actually furnished you under your contract (106,551, as indicated by the records of the United States Engineer's office from July 16, the effective date of notice to proceed, through December 12, 1940) represents work of 71 full days. Inasmuch as 150 calendar days elapsed between the dates mentioned, it appears to be established that you have been delayed 79 days by the conditions set forth herein. In the circumstances this letter authorizes an extension of contract time of 79 days up to and including December 12, 1940.

"In the event of delay subsequent to December 12, 1940, and the receipt of proper notice from you relative thereto, a further finding of facts will be prepared by this office at the appropriate time."

Delays in delivering areas to the plaintiff continued and defendant's officers were concurrently informed as to such delays.

Again, on May 17, 1941, after plaintiff's work was completed, the contracting officer made findings of fact and communicated them to the plaintiff in writing as follows:

"I have your letter of April 22, 1941, in which you request an additional increase in time of performance of 86 days under contract numbered CAA-2704, entered into with you by the Civil Aeronautics Administration covering the lighting of the Washington National Airport, Gravelly Point, Virginia.

"Contract time was 120 calendar days from date of receipt of notice to proceed. Order numbered 41-1600 dated July 8, 1940, constituted your notice to proceed and was received by you on July 15, 1940, thus fixing July 16, 1940, as the starting date of your contract time. Under date of December 20, 1940, you were granted an increase of 79 days in time of performance. This extension represented delays due to unforseeable causes which existed during the period July 16, 1940, to December 12, 1940, both dates inclusive, and thus fixed the final due date for completion as January 30, 1941. Performance was completed on April 18, 1941, after a delay of 78 days.

"The contract provided for a liquidated damage deduction of $100.00 per day for each day of delay in completion of the work but further provided that the contractor should not be charged liquidated damages because of any delay in completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but
22 not restricted to acts of the Government acts, of another contractor in performance of a contract with the Government, etc.

"It has been established that the Government has, by force account, graded certain areas of the airport and released such

graded areas to the paving contractor. Upon completion of the paving such areas were released to you for starting work under your contract.

"Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner.

"It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected and if the building had been completed by the time you were ready to start installation of the control desk.

"It is further represented that you maintained adequate administrative personnel to perform supervision of the W. P. A. forces which could have been utilized had no delays existed and had the areas been released to you when you were ready for them. It further appears that all equipment and materials to be furnished by you were ready or could have been ready for use in time to have allowed you to perform the work immediately upon release of the areas and building to you and that no delay would have been chargeable to you in this respect. In the circumstances you are entitled to an extension of contract time commensurate with the actual delay caused you by such conditions.

"Under the provisions of the contract you were to be furnished not to exceed 180,000 W. P. A. man-hours for the entire project. By dividing this number of man-hours by the contract time of 120 calendar days, which is a reasonable time for completion of the contract under ordinary circumstances, gives an average of 1,500 man-hours which theoretically could have been used by you each day during the contract time.

23 "From December 13, 1940, to April 18, 1941, an elapsed time of 127 days, you were furnished 26,011 W. P. A. man-hours. At the theoretical daily rate of 1,500 hours the man-hours actually employed represents 17.34 full working days. This condition was brought about by circumstances beyond the control and without fault or negligence on your part, and establishes that you were delayed approximately 110 calendar days due to excusable causes as contemplated by the contract provisions.

"Incidentally it might be well to state that the control tower should have been available to you during the early part of last fall but due to delays in connection with the building construction your installation could not be started until March 6, 1941. The installation of the control desk requires approximately two weeks and installation was performed by you in normal time without evidence of delay on your part.

"It might be held that no laborers would have been employed by you during the two weeks that you were engaged in installing the desk in the control tower, but it is not considered necessary to consider this phase of the matter since if this time of two weeks is deducted from the 120 days contract time the daily theoretical average of man-hours, would have been increased over the 1,500 hours which is used as a basis for determining the extension to which you are entitled, and would give the same results.

"Inasmuch as you have exceeded your contract time by only 78 days this letter authorizes an extension of 78 days due to unforeseeable causes of delay beyond your control and without your fault or negligence. No liquidated damages will be deducted from your final voucher."

No evidence has been proffered that the facts were contrary to those found by the contracting officer.

No liquidated damages for delay have been charged against or collected from the plaintiff.

5. The site of the Washington National Airport at Gravelly Point, Virginia, was created by hydraulic dredging. The defendant's engineers were faced with the problem of making the airport available for use long before the time it would take an ordinary hydraulic fill to become sufficiently consolidated to withstand heavy traffic.

Where it would ordinarily take four or five years for stabilization, the engineers were seeking to effect proper stabilization in less than one year.

24 Before the letting of plaintiff's work, or the beginning of any major work at the site, the defendant's engineers knew that they were confronted with a problem of quick stabilization.

There were to be four runways, (1) North-south, (2) East-west, (3) Northeast-southwest, and (4) Norwest-southeast. These runways were used as a sort of framework and the hydraulic dredges first deposited material on the runway sites. The heavier and coarser material remained on the runways, and the finer material, "fines" as they were called, flowed over to the side. Two dredges worked simultaneously on a runway, moving towards each other, and the union, where they met, was filled with the lighter material, which sloughed and had to be replaced.

In the dredging process pockets of unsatisfactory material were found, and had to be replaced with satisfactory material. Where the material on the surface was of coarse, granular material, such as sand, it had to be mixed in definite proportions with fine or clayey material, in order to achieve the necessary compaction.

Paving of the runways was the last operation thereon. When an area had been properly filled, graded and surfaced, it was released to the plaintiff for trench and conduit work, wiring, installation of manholes, handholes, lights and other work pertaining to its contract in that area. This work was done in the shoulders of runways and taxiways, and, due to the necessity of maintaining stabilization, could not be done before the paving.

As the fill progressed there was a lack of uniformity in the material deposited, and the areas were not, as a consequence, ready for delivery to the plaintiff except in detachments. There was a marked lack of continuity in plaintiff's work, due to the scattered deliveries thus made.

The length of time taken to make the fill, stabilize the material, do the grading and paving, was not anticipated by the defendant's engineers. They were skillful and diligent in their work, and released areas to the plaintiff as fast as they were able to do so.

There is no evidence in the case upon which a finding can be made as to delays by the paving contractor, referred to in the contracting officer's findings of facts.

25 6. By reason of the delays for which the contracting officer found the plaintiff was not responsible, the plaintiff incurred expenses for field overhead which it would not otherwise have incurred.

It was necessary for the plaintiff to maintain a supervisory force on the job continuously, standing by for resumption of work. The defendant could program the work of excavating, filling, grading, paving only a short distance ahead, and plaintiff could not in consequence keep to any definite schedule for any reasonable time in advance. The plaintiff could not hire and fire so-called key men with every segment of the work released by the defendant.

In consequence of the delay of 157 days suffered by the plaintiff, it incurred extra expense in the sum of $6,393.69, made up of $5,996.65 for pay roll of supervisory employees for the extent of delay, and $397.04 for compensation insurance, liability insurance, and old age and unemployment taxes on such pay roll.

Due to the fact that releases were made to the plaintiff in such manner as to require of plaintiff intermittent instead of continuous work, certain equipment of the plaintiff, powered by gasoline or oil, carried smaller loads or was operated in a less efficient manner. The cost of the additional gas or oil, necessary by reason of this situation, is not satisfactorily proved.

The protracted period of plaintiff's contract work necessitated keeping on the site of the work or in reserve therefor, beyond the original time for completion, utility trucks equipped with tool boxes and winches, and a pick-up truck. These trucks required repairs and maintenance during the periods of delay as well as during the periods of performance. It is not shown what extra expense there was, if any, in such repairs and maintenance due to the delay. The rental values of such equipment, testified to, are excessive in amount and there is no way of fixing upon reasonable rental values for the period of delay.

Water drained into the excavations for plaintiff's manholes, until the manholes, which were of concrete, could be installed. Plaintiff used pumps in keeping the excavations free of water.

There is no satisfactory proof as to the extent of extra time,
26 if any, that the pumps were kept in operation due to the delay, nor is the proof satisfactory as to rental values of the pumps so employed.

7. On or about August 13, 1941, the plaintiff filed a claim with the Civil Aeronautics Administration of the Department of Commerce for damages due to unforeseeable delays on the contract here in suit. The claim was stated in the amount of $18,304.94 plus 10 percent for overhead. The claim was denied January 29, 1942, for lack of jurisdiction, and no part thereof has ever been paid to the plaintiff.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $6,393.69.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of six thousand three hundred ninety-three dollars and sixty-nine cents ($6,393.69).

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

The plaintiff had a contract with the Civil Aeronautics Authority to furnish and install the field lighting at the Washington National Airport.

The airport was constructed at Gravelly Point, Virginia, and was on "made land." The site was created by hydraulic dredging and one of the problems before the Government engineers was how to expedite stabilization of the dredged material, which of course was heavily charged with water. Instead of using the conventional method of erecting boundary dykes and pouring the dredged material within the boundary thus made, with overflowing water, the engineers conceived the idea of pouring the dredged material

directly on the location of the projected runways, letting the finer materials flow off to the sides. Even with this expedited process there were difficulties that retarded the work, for pockets of fines would inevitably form, and, where two dredges worked
27 toward each other, there would be fine material at the point of union, which had to be excavated and replaced with compactible material, necessary for the foundation of the runway. The runways were to bear the burden of heavy traffic, the landing and taking off of planes.

Plaintiff's work could not proceed until the ground was ready. Plaintiff claims that its work, or some of it, could have proceeded before the final surface had been finished, but that was a matter for defendant's engineers, not the plaintiff, to decide. Plaintiff's work was essentially a "follow-up" job, just as is that of a plumber.

Article 1–11 of the specifications gave direction of the work to the Government's representative.

Regardless of any eventual practical considerations in the field, plaintiff knew beforehand that releases would be made to it only as paving of runways and rough-grading of shoulders were completed. Article 5–2 of the specifications gave priority to such paving and rough-grading.

Plaintiff's complaint, however, is not that the work was released to it in sections, but that the releases were so far apart as to extend its time for performance unduly and unreasonably.

The contracting officer seems to attribute some of the delay to the paving contractor, but the plaintiff does not rely on the paving contractor's responsibility for tardiness and we are without factual information with regard thereto.

The Government's representatives and operating force acted with great, if not unusual, diligence. They availed themselves of novel methods to assure expedition. No fault is or can be attributed to them.

The contracting officer's findings of fact charge delay in releasing certain stabilized areas to "unforeseen" soil conditions. This job involved an hydraulic fill. In every respect operations appear to have proceeded according to plan, a novel plan, and the plan, so pursued, expedited matters greatly.

But charging delay to "unforeseen" conditions is not charging them to "unforeseeable" conditions, which Article 9 of the contract provides for. There is nothing present in the contract situation, as evidenced here, that made soil conditions unforeseeable.
28 Apparently the fill was just what was expected, the coarser material remaining in the runway, the fines sloughing off to the side, precisely as planned.

There is no other conclusion than that the original time limitation of 120 days was a mistaken calculation, neither more nor less.

It turned out that way, whether the Government's contracting officer knew it in the beginning or not.

This case is to be distinguished from Crook Co. v. United States, 270 U. S. 4. In that case it was said, referring to a time limitation such as we have here: "But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work." Id., 6. We understand this to mean that the provisional nature of the time limitation, is just that, "provisional" not independent, and what makes it provisional is the reservation of "the right to make changes and to interrupt the stipulated continuity of the work." What the Supreme Court was considering was the interlocking of two contracts, the construction or prime contract and the follow-up contract. In the instant case there is no construction or prime contract, except as plaintiff's contract may be considered the "prime" contract.

In the Crook case, supra, the right to make changes in the prime contract was operative and that is what the Supreme Court obviously had in mind. The construction work was being done by the prime contractor, the Crook Company's work of installing a heating system being dependent upon the prime contractor's progress. The fact that the basic work of construction was being done by another contractor brought the provision for changes into play.

The Government does not order itself to make changes. The contracting officer's findings of fact indicate that the grading was done by "force account," that is, by a force of men hired by the Government, and not done through a contractor, except as to paving, in respect to which there is no record upon which any material finding can be made. Under these circumstances, there was no room for changes. There was no prime contract to be changed.

The time limitation in plaintiff's contract therefore, under
29 this view, was not provisional, because provisionality was dependent upon the existence of an operative change clause in the prime contract. This change clause is here wholly absent, and the Government's obligation is fixed accordingly.

It would be a strained construction to take the contract here in suit as allowing one of the contracting parties, the defending Government, an unlimited time for performance.

The Government set the time for performance, 120 days, and both parties had certain things to do within that time. The period of actual performance turned out to be 277 calendar days, as compared with the original contract time of 120 days. As appears by the findings of fact, plaintiff's was a follow-up contract, so that the period of 277 days represents practically the time consumed by both parties running concurrently. The extra

time of 157 days is not chargeable to delays, strictly speaking, for defendant's engineers were "skillful and diligent in their work." It is not chargeable to changes, for there were none. It is not chargeable to any act committed or omitted by the plaintiff.

There is no prime contractor here that might have delayed the plaintiff's work, a situation present in the Crook Co. case, supra, which would give a provisional character to the time clause. In the Crook case the presence of a prime contractor made the time clause in the follow-up contract provisional, because the prime contractor might not keep up to time. In the Crook case "the contract," as the Court said, "showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time." We cannot twist this statement into reading: "by the Government, which might not keep up to time."

In the case we have here the Government of course might not keep up to time, but the time the Government was to keep up to was the time of 120 days, fixed by the Government itself, and when the Government failed to "keep up to time," it necessarily breached its contract.

Under the circumstances we must conclude that the limitation of 120 days had not the provisional character found to exist in the Crook case; that it was therefore an obligation of the Government, party to the contract, to make performance within 120 days possible. Part of the agreed performance by the Government was to make the performance required of the plaintiff possible. The Government failed in such performance and must respond in damages for the breach.

United States v. Rice, reported 317 U. S. 61, was taken for review by the Supreme Court for alleged conflict with the Crook case. In the Rice case the respondent was the plumbing, heating, and electrical contractor, following up the principal contract of construction. There, as in the Crook case, there was a prime contract, as there is not here. The Court held that the time for performance of the follow-up contract was provisional, as in the Crook case, and stated:

"If there are rights to recover damages where the Government *exercises its reserved power to delay*, they must be found in the particular provisions fixing the rights of the parties." [Italics supplied.]

The delay the Court referred to was delay "incident to the permitted changes."

In the case now presented there were no changes, and any supposed power given to delay on account of changes was not only not exercised, but could not have been exercised, because there was no prime contract in existence giving that power.

The reason given therefore in the Crook and Rice cases, for construing the time limitation in a follow-up contract as not binding upon the Government, is absent in the present case. There is here only one contract in issue, a contract that followed up the Government's work directly, that did not follow up the work of another or prime contractor.

It may be noted that the commissioner who reported on the case concluded, with respect to certain extra expenses, that there was no way from the record of determining their reasonable amount. The plaintiff excepts to this and suggests a "jury verdict" fixing the amount. But there must be some guide even for a jury verdict, it must not be based on speculation, and the proponent is not without obligation to proffer this guide, even though its adoption might tend to decrease the amount sued for. See Owen, trustee v. United States, 80 C. Cls. 249, 256.

31 The plaintiff also claims 10 percent for overhead on an item of $6,393.69, made up of $5,996.65 for payroll of supervisory employees and $397.04 for compensation insurance, etc. Supervision is overhead, as distinguished from direct labor, and we are satisfied that an additional 10 percent is improper.

Judgment will be limited to $6,393.69. The plaintiff is entitled to recovery of that amount and entry of judgment will be made accordingly. It is so ordered.

JONES, Judge; WHITAKER, Judge; and LITTLETON, Judge, concur.

MADDEN, Judge, took no part in the decision of this case.

NOTE.—The contract and specifications made a part of these findings by reference accompany this record under separate cover.

33 *Judgment*

At a Court of Claims held in the City of Washington on the 3d day of December A. D., 1945, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $6,393.69.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of six thousand three hundred ninety-three dollars and sixty-nine cents ($6,393.69).

35 [Clerk's certificate to foregoing transcript omitted in printing.]

36 In the Supreme Court of the United States

Stipulation not to print exhibits

It is hereby stipulated by and between counsel for the parties in the above-entitled cause that Exhibits 1 and 2 filed by respondent in the Court of Claims (consisting of the contract between petitioner and respondent dated June 27, 1940, and the specifications referred to therein) which are part of the record of said cause in said court and which by reference (Fdg. 2) are made part of the Special Findings of Fact of said court need not be printed as part of the record of the above-entitled cause in this Court but shall nevertheless be considered a part of the record and may be referred to by the Court and by counsel in the briefs and on oral argument.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.
Alexander M. Heron,
ALEXANDER M. HERON,
Counsel for Respondent.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

Order allowing certiorari

Filed April 22, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 1 1946
CHARLES ELMORE CROPLEY

No. 902 50

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

THE HOWARD P. FOLEY COMPANY, INC., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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CITATIONS

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6 Williston, *Contracts* (rev. ed., 1938), § 1964	13, 15

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 902

UNITED STATES, PETITIONER

v.

THE HOWARD P. FOLEY COMPANY, INC., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on December 3, 1945.

OPINION BELOW

The opinion of the Court of Claims (R. 16–20) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 3, 1945 (R. 20). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether under the standard form of Government construction contract the Government is liable in damages to the contractor where the contractor is unable to complete performance within the time specified in the contract due to the Government's inability, despite its skill and diligence, to have the site completely ready for the contractor within that time, and where the delay was due to unforeseeable causes.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, pp. 17–20.

STATEMENT

This is a suit to recover from the United States damages claimed to be due to delays in the performance of a Government contract (R. 1–2). The facts, as found by the Court of Claims (R. 9–16), are as follows:

On June 27, 1940, respondent, an electrical contractor, engaged in business in Washington, D. C. (Fdg. 1; R. 9), entered into a contract with the United States on standard form Government contract No. 23 to furnish the materials for and construct a field lighting system for the Washington National Airport, Gravelly Point, Virginia, at the contract price of $187,000 (Fdg. 2; R. 9, 1, 3). The work was to be "commenced as soon as practicable" and "completed within one hundred

twenty (120) calendar days from date of receipt of notice to proceed" (Fdg. 2; R. 9, 3; *infra*, p. 17). Notice to proceed was received by respondent on July 15, 1940 (Fdg. 2; R. 9) and respondent did not complete performance until April 18, 1941 (Fdgs. 3, 4; R. 10, 12).

The site of the Airport was "created" by hydraulic dredging and the Government sought to achieve, in less than one year, a degree of site stabilization which would ordinarily require four or five years (Fdg. 5; R. 14). "Pockets of unsatisfactory material were found" in the materials deposited on the runway sites by the dredges and these "had to be replaced with satisfactory material" (Fdg. 5; R. 15). Other substitutions of materials also had to be made "in order to achieve the necessary compaction" (Fdg. 5; R. 15). Respondent's work could not be done before the runways were paved. "When an area had been properly filled, graded and surfaced, it was released" to respondent for the "work pertaining to its contract in that area" (Fdg. 5; R. 15). Because of "a lack of uniformity in the material deposited" by the dredges, "the areas were not * * * ready for delivery to [respondent] except in detachments" and "there was a marked lack of continuity in [respondent's] work due to the scattered deliveries thus made" (Fdg. 5; R. 15). "The length of time taken to make the fill, stabilize the material, do the grading and

paving, was not anticipated by the [Government's] engineers. They were skillful and diligent in their work, and released areas to the [respondent] as fast as they were able to do so" (Fdg. 5; R. 15, 17).

Respondent complained to the appropriate Government officers regarding the delays thus encountered (Fdg. 4; R. 10, 12). On December 20, 1940, the contracting officer made, *inter alia*, the following findings of fact:

> Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner. It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that at no time have you been entirely stopped from your work and that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected. * * * (Fdg. 4; R. 10–12.)

The contracting officer accordingly found that respondent was entitled to "an extension of contract time" and extended its time 79 days (Fdg. 4; R. 11–12). On May 17, 1941, after respondent's work was completed (Fdg. 3; R. 10), the contracting officer made similar findings of fact and granted respondent an additional 78-day extension of time (Fdg. 4; 12–14). The extensions thus granted extended the time for respondent's performance to the date on which respondent completed performance (Fdgs. 3, 4; R. 10, 12–14).

Respondent was paid the contract price as adjusted by change orders (Fdg. 3; R. 10) and no liquidated damages for delay were charged against or collected from it (Fdg. 4; R. 14).

On August 19, 1942, respondent brought this suit in the Court of Claims (R. 1–3), alleging that it had incurred increased costs [1] due to the 157-day period beyond the original contract time over which it was required to extend its performance (R. 2). The Court of Claims held that the contract period of 120 days was "an obligation of the Government * * * to make performance within

[1] "Additional overhead by way of maintaining superintendent and administrative forces, together with equipment and operators therefor, upon the site of the work for 157 days longer than would have been necessary had the work proceeded without such delay, and * * * additional Social Security and unemployment taxes and workmen's compensation insurance upon the superintendent, administrative and other forces * * * together with an additional general overhead * * *" (R. 2).

120 days possible. * * * The Government failed in such performance and must respond in damages for the breach" (R. 19). The court entered judgment for the respondent in the amount of $6,393.69 (R. 16, 20).[2]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Government, by specifying that the work under the contract was to be completed within 120 days, assumed the obligation of making performance within 120 days possible.

2. In holding the Government liable in damages to the contractor for delays in the ultimate completion of the job.

3. In holding that the contractor could recover damages for delays in the ultimate completion of the job, in addition to extensions of time granted the contractor by the contracting officer pursuant

[2] Damages allowed comprised the "pay roll of supervisory employees for the extent of delay" and compensation and liability insurance and taxes on such pay roll (Fdg. 6; R. 15). Other damages claimed by respondent, including the "reasonable rental values" of certain of respondent's equipment which respondent was required to keep on the site of the work during the extended period (Fdg. 6; R. 16), were disallowed as not properly or sufficiently proved. Cf. *Henry Ericsson Company* v. *United States*, C. Cls. No. 44614, decided October 1, 1945, certiorari denied March 4, 1946, No. 701, this Term; *B–W Construction Company* v. *United States*, C. Cls. No. 43915, decided November 5, 1945, certiorari denied March 4, 1946, No. 748, this Term.

to Article 9 of the standard form of Government construction contract (*infra*, p. 18).

4. In failing to follow the decisions of this Court in *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, with respect to liability for such delays.

5. In holding the Government responsible for delays even though "the Government's representatives and operating force acted with great, if not unusual, diligence. They availed themselves of novel methods to assure expedition. No fault is or can be attributed to them" (Fdg. 5; R. 17, 15).

6. In holding that the delays were not due to unforeseeable causes, within the meaning of Article 9 of the standard form of Government construction contract (*infra*, p. 18).

7. In failing to accord finality to the findings of fact of the contracting officer (Fdg. 4; R. 10-14) that the delays were due to unforeseeable causes.

8. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

1. In the instant case, respondent was required by its contract to complete performance within 120 days after notice to proceed (Fdg. 2; R. 9, 3; *infra*, p. 17). Completion within that time was rendered impossible by delays which occurred in constructing the Airport site (Fdgs. 4, 5; R. 11–15). These delays were unavoidable, both by respondent and, as the court below found, by the Gov-

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